

(2022) 09 MP CK 0065

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 2433 Of 2022

Kanhaiya Singh Shakya And Others

APPELLANT

Vs

Lakshmi Bai And Others

RESPONDENT

Date of Decision : 06-09-2022

Acts Referred:

Constitution Of India, 1950 — Article 136, 227
Code Of Civil Procedure, 1908 — Section 151, Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1
Evidence Act, 1872 — Section 110, 114
Specific Relief Act, 1963 — Section 6
Code Of Criminal Procedure, 1973 — Section 145
Indian Penal Code, 1860 — Section 154, 158

Citation : (2022) 09 MP CK 0065

Hon'ble Judges : Arun Kumar Sharma, J

Bench : Single Bench

Advocate : Samdarshi Tiwari, Dayaram Vishwakarma, Brajendra Kushwaha

Final Decision : Disposed Of

Judgement

Arun Kumar Sharma, J

1. This petition under Article 227 of the Constitution of India has been filed challenging the orders dated 1.4.2022 and 18.2.2021 (Annexures-P/17 and P/15 respectively) passed by the Courts below.

2. By the order impugned dated 18.2.2021 (Annexure-P/15), the application under Order 39 Rule 1 and 2 of the Code of Civil Procedure filed by the plaintiffs/petitioners before the trial Court seeking injunction, has been rejected. Thereafter, challenging the said order, an appeal was preferred before the appellate Court and by the order impugned dated 1.4.2022 (Annexure-P/17), the appellate Court has affirmed the order of the trial Court and dismissed the appeal saying that the plaintiffs failed to prove the required ingredients and also their possession over the land for which injunction is being sought.

3. The facts of the case reveal that the petitioners before this court, who are the plaintiffs before the trial court, have filed a civil suit in the court of 7th Civil Judge Class-2, Bhopal against the respondents / defendants, seeking a decree of declaration of title in respect to 6.67 acres of land out of 18.66 acres situated at Prabhat Petrol Pump Square in front of Hotel Silver Inn, Bhopal and for perpetual injunction and for restraining the defendant (State of M.P.) from interfering in their peaceful possession. It has also been stated in the civil suit that the respondents no.1 and 2 are the wife and son of Late Kunjilal, respectively. The petitioners no. 1 to 3 are children of late Dalchand and petitioner no. 4 (a) and 4 (b) are grand-children of late Dalchand. Late Dalchand and Late Kunjilal were real brothers and successors to late Hariram (grand father of petitioners no. 1 to 3). Late Hariram inherited about 27.67 acres of land from his father late Goverdhan. Out of 27.67 acres of land, 18.66 acres of land relates to Khasra No.33-41/1 and 33-41/2, situated at Prabhat Petrol Pump Square and out of 18.66 acres of aforesaid land, the dispute is with regard to 6.67 acres. After the death of Hariram, his sons late Dalchand and late Kunjilal became the owner of the aforesaid property by way of succession. Since, it was the ancestral property without any partition during lifetime of late Hariram, same remained under the joint ownership and possession of both the sons, Kunjilal and Dalchand. The petitioners also filed an application under Order 39 Rule 1 and 2 C.P.C. before the trial court but the learned Trial court vide order dated 18.2.2021 dismissed the application. Being aggrieved, the petitioners preferred an appeal under the provisions of Order 43 Rule 1 read with section 151 of C.P.C., that too was dismissed by the learned Appellate court vide impugned order dated 1.4.2022.

4. Learned counsel for the petitioners submits that both the courts below have miserably failed to appreciate undisputed fact that the suit land is a part of joint ancestral property without any partition during the lifetime of late Hariram and therefore, father of the plaintiffs / petitioners late Dalchand, so as his legal heirs have birth right over half of the portion thereof. From the order dated 31.12.1991 it is clear that the petitioners are in possession of the suit property. There are other valid and legal documents viz electricity bills in the name of father of petitioners no.1 to 3 and joint agreement made by late Dalchand and late Kunjilal of the year 1975 and 1984 with the Grah Nirman Samiti, Khasra entries which clearly proves the possession of the petitioners. Further contended that the respondents no. 3 and 4 cannot be called as valid and legal owner of the suit property as the very will on the basis of which they are claiming title is surrounded by suspicious circumstances and the same is challenged by the respondents no.1 and 2 in the court of law wherein the petitioners have also intervened. The will also appears to be fabricated and concocted because it bears the thumb impression of late Kunjilal whereas the documents mentioned viz Annexure-P/7 and P/8 bears signature of late Kunjilal. Further contended that it is a fit case for grant of temporary injunction on the ground of existence of prima facie case in favour of the petitioners. Secondly, balance of convenience also tilts in favour of petitioners as comparative mischief or inconvenience to the

petitioners from withholding the injunction will be greater than that which is likely to arise from granting it. Thirdly, the petitioners will suffer irreparable injury if the temporary injunction is not granted in the present case. The petitioners are in possession of the suit property since last so many decades and suddenly if they are dispossessed they will neither have place for residence nor will have land for farming and to earn their livelihood. In support of his contentions, learned counsel for the petitioners has placed heavy reliance in *Ramdayal vs. Manaklal*, (1973) AIR (MP) 222 and *Raj Kumar Jain, Vinay Kumar Jain and others vs. Vivek Kumar Jain* decided on 21.8.2012 in M.A.No.1754/2011 and prayed that the present petition be allowed by setting aside the impugned orders passed by both the courts below and interim injunction be granted in favour of the petitioners.

5. In turn, learned counsel for the respondents have vehemently refuted the aforesaid contentions advanced by learned counsel for the petitioners and submitted that learned both the courts below have rightly passed the orders rejecting the application under Order 39 Rule 1 and 2 of C.P.C. In order to buttress their contentions, reliance has been placed on *Mushamma Sarod Patnaha and others vs. Harishankar and others*, (2002) 2 MPLJ 46; *Makers Development Services Pvt. Ltd. vs. M. Visvesvaraya Industrial Research and Development Centre*, 2012 (2) MPLJ 292, *Badri Prasad and another vs. State of M.P.*, 2010 (2) MPLJ 337 and *Baboolal (since dead) through his Lrs Krishnabai and others vs. Kalooram and others*, 2012 (1) MPLJ 158 and prayed that the petition be dismissed with heavy costs.

6. Heard learned counsel for the parties at great length and perused the record. The matter is being disposed of with the consent of the parties at motion hearing stage itself.

7. This court has carefully gone through the order passed by both the courts below and prima facie, it is found that the plaintiffs/petitioners have failed to prove their possession over the land in question and no documents have been filed by them showing that they are in possession of the said land. In para 5.4 of the petition itself it has been admitted that in the revenue records the name of the State Government, Industries Department was mutated and the State Government also contended before the trial court that the suit land was recorded in the revenue records in the name of the State Government and the same was reflecting till the year 2019 and it was subjected to acquisition proceedings.

8. The trial Court has taken into account the aspect regarding prima-facie case / prima-facie title and has arrived at a conclusion that plaintiff has failed to prove that when and how Government land became the private land of the plaintiff's predecessor because from perusal of the record and the documents it appears that name of the State Government was reflecting in the revenue records till 2019 in the disputed property. As there was no prima-facie case, balance of convenience, irreparable loss, the trial Court has declined the application preferred under Order XXXIX Rule 1 and 2 of the Code of Civil Procedure, 1908.

9. The apex Court in the case of Skyline Education Institute (India) Private Limited Vs. S. L. Vaswani and Another reported in (2010) 2 SCC 142 in paragraphs No.19 to 22 has held as under:- 19. We have thoughtfully considered the entire matter. Before pronouncing upon the tenability or otherwise of the appellant's prayer for restraining the respondents from using the word 'Skyline' for the Institute of Engineering and Technology established by them, we consider it necessary to observe that as the suit filed by the appellant is pending trial and issues raised by the parties are yet to be decided, the High Court rightly considered and decided the appellant's prayer for temporary injunction only on the basis of the undisputed facts and the material placed before the learned Single Judge and unless this Court comes to the conclusion that the discretion exercised by the High Court in refusing to entertain the appellant's prayer for temporary injunction is vitiated by an error apparent or perversity and manifest injustice has been done to it, there will be no warrant for exercise of power under Article 136 of the Constitution.

20. In *Wander Ltd. v. Antox India (P) Ltd* 1990 (Supp.) SCC 727, this Court was called upon to determine the scope of appellate court's power to interfere with the discretion exercised by the court of first instance in granting or refusing the prayer for temporary injunction. The facts of that case were that in the suit filed by it, respondent- Antox India (P) Ltd. had prayed for restraining the appellant from using registered trade mark 'Cal-De-Ce'. The learned Single Judge of the High Court refused to entertain the respondent's prayer but on reconsideration of the matter the Division Bench passed an order of injunction. This Court reversed the order of the Division Bench and observed: (SCC p. 733, para 14)

"14. ... In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

21. The proposition of law laid down in *Wander Ltd. v. Antox India (P) Ltd* (1990 Supp 727) was reiterated in *N.R. Dongre v. Whirlpool Corporation* (Supra) in which this Court considered the correctness of an order of temporary injunction passed by the learned Single Judge of the Delhi High Court in a suit filed by the respondents to restrain defendants from manufacturing, selling, advertising or in

any way using the trade mark 'Whirlpool' or any other trade mark deceptively or confusingly similar to the trade mark 'Whirlpool' in respect of their goods. The claim of the plaintiffs-respondents was based on prior user of the mark 'Whirlpool'. After considering the rival pleadings and material placed before him, the learned Single Judge granted temporary injunction. The Division Bench confirmed that order and dismissed the appeal preferred by the appellant. This Court, declined to interfere with the discretion exercised by the learned Single Judge and Division Bench of the High Court and held: (N.R.Dongre case, SCC P.727, para 18).

"18. Injunction is a relief in equity and is based on equitable principles. On the above concurrent findings, the weight of equity at this stage is in favour of the plaintiffs and against the defendants. It has also to be borne in mind that a mark in the form of a word which is not a derivative of the product, points to the source of the product. The mark/name 'WHIRLPOOL' is associated for long, much prior to the defendants' application in 1986 with the Whirlpool Corporation, Plaintiff 1. In view of the prior user of the mark by Plaintiff 1 and its trans-border reputation extending to India, the trade mark 'WHIRLPOOL' gives an indication of the origin of the goods as emanating from or relating to the Whirlpool Corporation, Plaintiff 1. The High Court has recorded its satisfaction that use of the 'WHIRLPOOL' mark by the defendants indicates prima facie an intention to pass off the defendants' washing machines as those of the plaintiffs or at least the likelihood of the buyers being confused or misled into that belief." A somewhat similar view was expressed in Cadila Health Care Ltd. v. Cadila Pharmaceuticals 2001 (5) SCC 73.

22. The ratio of the above noted judgments is that once the court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a denovo consideration of the matter it is possible for the appellate court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity. In the aforesaid case, the apex Court was considering an issue of Trade Marks Act, 1999 and has observed that once the Court of first instance exercises its discretion to grant or refuse to grant relief of temporary injunction and said exercise of discretion is based upon objective consideration of material placed before the Court and is supported by cogent reasons, appellate Court will be loath to interfere simply because on a denovo consideration of the matter, it is possible for the appellate Court to form a different opinion on the issues of prima-facie case, balance of convenience, irreparable injury and equity.

10. The apex Court in the case of State of Andhra Pradesh and Others Vs. Star Bone Mill and Fertiliser Company reported in (2013) 9 SCC 319 in paragraphs No.17 to 25 has held as under:-

17. No person can claim a title better than he himself possess. In the instant case, unless it is shown that M/s. A. Allauddin & Sons had valid title, the respondent/plaintiff could not claim any relief whatsoever from court.

18. In *Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors.*, AIR 2008 SC 901, this Court held as under:-

12. A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act.

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19. In *Nair Service Society Ltd. v. K.C. Alexander & Ors. & Ors.*, AIR 1968 SC 1165, dealing with the provisions of Section 110 of the Evidence Act, this Court held as under:-

15.Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides.

20. In *Chief Conservator of Forests, Govt. of A.P. v. Collector & Ors.*, AIR 2003 SC 1805, this Court held that :

Â?Â?20. Presumption, which is rebuttable, is attracted when the possession is prima facie lawful and when the contesting party has no title.

21. The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the aforesaid provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim Â?Â? possession follows titleÂ?Â? is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not prima facie wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It in fact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass /encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent

title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act.

22. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property.

23. The trial court has recorded a finding to the effect that the name of one Raja Ram was shown as Pattadar in respect of the land in dispute and the respondent/plaintiff is in possession. Therefore, the burden of proof was shifted on the government to establish that the suit land belonged to it. Learned counsel for the respondent/plaintiff could not furnish any explanation before us as to who was this Raja Ram, Pattadar and how respondent/plaintiff was concerned with it. Moreover, in absence of his impleadment by the respondent/plaintiff such a finding could not have been recorded.

24. The courts below erred in holding, that revenue records confer title, for the reason that they merely show possession of a person. The courts below further failed to appreciate that the sale deed dated 11.11.1959 was invalid and inoperative, as the documents on record established that the vendor was merely a lessee of the Government.

25. In view of the above, we are of the considered opinion that findings of fact recorded by the courts below are perverse and liable to be set aside. The appeal succeeds and is allowed. The judgments of the courts below are hereby set aside. The suit filed by the respondent/plaintiff is dismissed.

11. Further, the Supreme Court in the case of Premji Ratansey Shah & Others Vs. Union of India & Others reported in JT 1994 (6) S.C.585, has observed as under:-

"It is equally settled law that injunction would not be issued against the true owner. Therefore, the Courts below have rightly rejected the relief of declaration and injunction in favour of the petitioners who have no interest in the property. Even assuming that they had any possession, their possession is wholly unlawful possession of a trespasser and an injunction cannot be issued in favour of a trespasser or a person who gained unlawful possession, as against the owner. Pretext of dispute of identity of the land should not be excuse of claim injunction against true owner."

12. On a bare perusal of the orders passed by the Courts below, it reveals that both the Courts below have given finding on the basis of material available before them. As such, relying upon the finding given by the trial Court, the Appellate Court has also found that balance of convenience is not made out in

favour of the petitioners / plaintiffs, therefore, no injunction could have been granted, the application filed by them was rightly rejected by the trial Court. As per the observation made by both the Courts below, I am not inclined to interfere in the matter. The order passed by the learned appellate court is well-reasoned. The judgments on which reliance has been placed by the petitioners are altogether different from the facts and circumstances of the present case. In turn, I find much force on the judgments cited by learned counsel for the respondents.

13. In the considered opinion of this Court, no illegality or perversity has been noticed in the order passed by the trial Court as well as by lower appellate court. Both the courts below have passed the order after taking into account rival contention of the parties and this Court also does not find any reason to allow the petition and set-aside the order passed by the courts below in the peculiar facts and circumstances of the case.

14. Resultantly, the petition is devoid of merit and substance and is accordingly dismissed. It is made clear that the observations made by this Court, while deciding the present petition, will not come in way of the parties, so far as the civil suit is concerned. The trial Court shall decide the civil suit without being influenced by the order passed by this Court on the basis of the evidence adduced by the parties during the trial.

All pending applications are accordingly disposed of.